

No. 48466-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DAVID FOX, Appellant.

Appeal from the Superior Court of Cowlitz County
The Honorable Marilyn Haan
No. 14-1-00645-1

**REPLY BRIEF OF APPELLANT
DAVID FOX**

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I. ARGUMENT

1. This Court Should Consider the Prosecuting Attorney's Conflict of Interest for the First Time on Appeal Because It is a Manifest Error Effecting a Constitutional Right.

The State argues that this court should not consider the prosecuting attorney's conflict of interest because it was not raised by Mr. Fox's trial attorney. Although defense counsel did not object at trial, manifest errors effecting constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). "[C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *State v. McFarland*, 127 Wash. 2d 322, 333, 899 P.2d 1251, 1255–56 (1995), as amended (Sept. 13, 1995), citing *State v. Scott*, 110 Wash.2d 682, 686–87, 757 P.2d 492 (1988).

a. *The Prosecuting Attorney's Conflict of Interest Raises a Constitutional Issue.*

In its brief, the State does not contest that the prosecuting attorney's conflict of interest raises a constitutional issue. The State acknowledges that a conflict of interest by defense counsel raises a constitutional issue under the Sixth Amendment; and, therefore, a conflict of interest with the prosecuting attorney may raise a constitutional issue.

See Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 291 (2002); *State v. Dhaliwal*, 150 Wn.2d 559, 568-71, 79 P.2d 432 (2003).

Other courts have held that a prosecuting attorney's conflict of interest is a violation of due process. "The absence of an impartial and disinterested prosecutor has been held to violate a criminal defendant's due process right to a fundamentally fair trial." *State of N.J. v. Imperiale*, 773 F. Supp. 747, 750 (D.N.J. 1991), citing *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir.1967) (conviction violated fundamental fairness assured by due process clause when part-time Commonwealth Attorney suffered impermissible conflict of interest by prosecuting defendant for criminal assault while simultaneously representing defendant's wife in divorce action); *see also State v. Burns*, 322 S.W.2d 736, 742 (Mo. 1959) (noting that conflict may be violation of due process and reversing conviction); *Young v. State*, 177 So.2d 345, 347 (Fla. Dist. Ct. App. 1965) (former public defender prosecuting client is violation of due process); *see also* U.S. CONST. amend XIV; WASH. CONST. art. I § 3.

b. *This Court Should Consider a Conflict of Interest a Manifest Error.*

The State argues that the error is not manifest because Mr. Fox cannot show prejudice; and, therefore, this court should not consider the

conflict of interest on appeal. However, the State misstates the standard for determining whether an error is manifest.

“In normal usage, ‘manifest’ means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. *State v. Lynn*, 67 Wash. App. 339, 345, 835 P.2d 251, 255 (1992). “Stated another way, the appellant must ‘identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.’” *State v. O’Hara*, 167 Wash. 2d 91, 98, 217 P.3d 756, 760 (2009), as corrected (Jan. 21, 2010), quoting *State v. Kirkman*, 159 Wash.2d 918, 926-27, 155 P.3d 125 (2007). Once the court determines that the error is manifest, it is subject to constitutional harmless error analysis, whereby the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *O’Hara*, 167 Wash. 2d at 99–100.

[A] harmless error analysis occurs after the court determines the error is a manifest constitutional error. The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.

Id. Therefore, in determining whether to review a constitutional issue for the first time on appeal, the defendant is not required to show that the error

prejudiced him, he is required to show that the error was obvious and effected a constitutional right.

Several courts have found that when a prosecuting attorney has a conflict of interest it is a due process violation, regardless of prejudice.

In holding that a part-time district attorney may not represent a criminal defendant anywhere in the state of Oklahoma, the Court of Criminal Appeals of Oklahoma reasoned that although it was difficult or impossible to determine whether the representation was actually affected, “[t]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice. The conflicts presented in this case, at the very minimum, give the proceeding an appearance of being unjust and prejudicial.”

State v. Tracer, 173 Wash. 2d 708, 720, 272 P.3d 199, 204 (2012), citing *Howerton v. State*, 1982 OK CR 12, 640 P.2d 566, 568 (1982).

“[W]here a conflict of interest appears, the reversal of a conviction is required even if the defendant is unable to identify specific prejudicial acts on the part of the prosecutor.” *Young*, 177 So. 2d at 346. Our Supreme Court stated that a prosecutor who previously represented the defendant “has likely acquired some knowledge of facts upon which the prosecution is predicated.” *State v. Stenger*, 111 Wash.2d 516, 520-21, 760 P.2d 357 (1988). Reversal is required without a showing of prejudice because “in any given case, except a very unusual one, it would not be possible for the defendant to prove any such breach of confidence or

resulting prejudice.” *State v. Detroit Motors*, 62 N.J. Super. 386, 394, 163 A.2d 227, 231 (Law. Div. 1960).

In this case, as argued above, the conflict of interest violated Mr. Fox’s constitutional right to due process. The fact that the elected prosecuting attorney previously represented Mr. Fox, on this same case, is an obvious constitutional error that clearly effected his due process rights. There is no way to definitively prove that the conflict prejudiced Mr. Fox. However, Mr. Jurvakainen personally represented Mr. Fox and then was the elected prosecuting attorney; and therefore, the supervisor of the prosecuting attorney who tried Mr. Fox. The first trial resulted in a mistrial due to a hung jury. In the first trial the State chose not to call the C.I.; the C.I. was called in the second trial. It is certainly possible that the trial strategy was affected by Mr. Jurvakainen’s previous representation of Mr. Fox. And, there is no way of knowing whether or not plea negotiations were effected. Due to the obvious conflict, the impossibility of proving actual prejudice, and the appearance of fairness, this court should consider the conflict for the first time on appeal.

- c. *Mr. Fox Cannot Waive the Conflict by Failing to Object Because the Prosecuting Attorney Had a Duty to Withdraw and the Court Has a Duty to Inquire Into a Potential Conflict of Interest.*

Some courts have found that a conflict of interest with the prosecuting attorney's office is reversible error based on the prosecuting attorney's failure to withdraw or the court's failure to inquire into the conflict.

In Kansas, the court held that when a prosecuting attorney had a conflict of interest with a defendant, "counsel for the state should have voluntarily withdrawn and upon his failure to do so, it became the duty of the trial court to have forbidden his further participation therein." *State v. Leigh*, 178 Kan. 549, 553, 289 P.2d 774, 777 (1955).

Similarly, Division I reversed a conviction where the trial court failed to inquire into the nature of defendant's standby counsel's conflict of interest where the defendant filed a lawsuit against standby counsel. *State v. McDonald*, 96 Wash. App. 311, 320, 979 P.2d 857, 862 (1999), *aff'd*, 143 Wash. 2d 506, 22 P.3d 791 (2001). "Because the court did not ask or consider these issues, there is no information in the record that might describe the extent of any actual conflict between Mr. Gaer's duties to McDonald and his defense in the federal lawsuit. . . . we must

nevertheless reverse McDonald's conviction and remand for a new trial."

Id.

Therefore, once the court was aware of the conflict of interest, the court had a duty to inquire and determine whether or not to allow the prosecuting attorney to remain on the case. The prosecuting attorney also had an obligation to withdraw. In both of these cases, the defendant did object, but the rulings were that it was the prosecuting attorney's failure to withdraw and/or the court's failure to inquire into the conflict, that constituted the error. In this case, the conflict is obvious without further inquiry based on *Stenger*; therefore, the trial court should not have **allowed** the case to go forward without a special prosecutor. The failure of the court to inquire into the conflict and the failure of the prosecuting attorney to withdraw are both errors, regardless of Mr. Fox's failure to object. Therefore, this court should consider the conflict of interest for the first time on appeal.

2. The Remedy for Being Tried by a Prosecuting Attorney's Office that Had a Conflict of Interest Should be a New Trial.

The State argues that even if this court finds that it was error for the Cowlitz County Prosecuting Attorney's office to prosecute Mr. Fox because of the conflict of interest, he is not entitled to a new trial.

There are no Washington cases directly on point. *Stenger* was an interlocutory appeal, so the remedy was simply disqualification of the prosecutor's office. *Stenger*, 111 Wash.2d at 521–22. However, in *Tracer*, our Supreme Court reversed a guilty plea because of a conflict of interest with a special deputy prosecuting attorney. *Tracer*, 173 Wash. 2d at 723.

Other jurisdictions have held that the remedy is reversal. *Burns*, 322 S.W.2d 736 (remedy for prosecuting attorney's conflict of interest is reversal, no prejudice is required); *Young v. State*, 177 So. 2d 345, 346 (Fla. Dist. Ct. App. 1965) (remedy is reversal); *Leigh*, 178 Kan. at 553, (remedy is reversal); *Ganger*, 379 F.2d at 715 (remedy for conflict was to vacate guilty plea and remand).

The State cites *Thompson v. State* to argue that Florida only requires reversal when a “former defender turned prosecutor . . . act[s] directly against his former client in a related matter, []or provide[s] information or assistance for those who would so act.” *Thompson v. State*, 246 So.2d 760, 763 (Fla. 1971). However, the court was clarifying when a prosecutor should be disqualified. *Id.* If the prosecuting attorney should have been disqualified, then the remedy is reversal. *Id.* The court in *Thompson* did not overrule *Young*, which held the remedy was reversal. *Id.* *Thompson* simply distinguished *Young*. *Id.* In *Young*, the prosecuting attorney had represented the defendant in the same case, prior to becoming

the prosecuting attorney, while in *Thompson*, the co-defendant's prior defense attorney was hired by the prosecuting attorney's office, but was not directly working on Mr. Thompson's case. *Id.* at 761-63. In this case, Mr. Fox was personally represented by Mr. Jurvakainen in this case. And, while Mr. Jurvakainen was not the attorney who actually tried the case, he was the elected prosecutor. Our Supreme Court has made it clear that when the elected prosecutor personally represented the defendant in the same case, the entire office is disqualified. *Stenger*, 111 Wash.2d at 521-22.

Therefore, it is clear that the Cowlitz County Prosecuting Attorney's office should have been disqualified. There is no way to know, and it would be impossible for Mr. Fox to prove, whether anything he told Mr. Jurvakainen was used against him in plea negotiations, his trial, or re-trial. Furthermore, the obvious conflict of interest raises concerns regarding the appearance of fairness. Therefore, the only appropriate remedy is reversal of the conviction and a new trial by a different prosecuting attorney's office.

3. If This Court Does Not Find That the Prosecuting Attorney's Conflict of Interest is a Manifest Constitutional Error That Should be Considered for the First Time on Appeal, Then This Court Should Consider Whether Mr. Fox Received Ineffective Assistance of Counsel Because His Attorney Failed to Object to the Conflict.

The State argues that this court should not consider the prosecuting attorney's conflict of interest on appeal. However, even if this court does not find that the conflict constitutes a manifest constitutional error that can be heard for the first time on appeal, this court should still consider the conflict of interest to determine whether Mr. Fox received ineffective assistance of counsel when his attorney failed to object to the conflict. Mr. Fox raised ineffective assistance of counsel for failure to object to the conflict of interest in appellant's brief; the State did not respond that that argument.

I. CONCLUSION

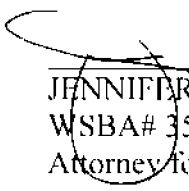
In conclusion, there was a conflict of interest and the entire Cowlitz County Prosecuting Attorney's office should have been disqualified. The conflict of interest is a manifest constitutional error that this court should consider for the first time on appeal. And, the appropriate remedy is reversal of the conviction.

In the alternative, this court should consider whether Mr. Fox was denied effective assistance of counsel where his attorney failed to

object to the conflict of interest. For all the reasons stated above, this matter should be reversed and remanded for a new trial.

Dated this 24th day of October, 2016.

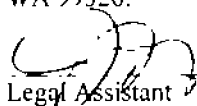
Respectfully Submitted,



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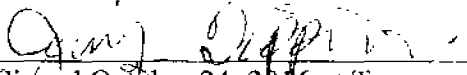
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